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Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 50

J. E. RILEY INVESTMENT COMPANY,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

PETITION.

J. E. Riley Investment Company, by its counsel, prays that a writ of certiorari issue to review the judgment

of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case December 26, 1939 (R. 46), affirming a decision of the United States Board of Tax Appeals (R. 19-28). After this Court's decision in *Haggar Company* v. *Helvering*, 84 L. Ed. 287, 60 S. Ct. 337, a petition for rehearing was filed. The said petition for rehearing was denied March 16, 1940, in an opinion, Mathews, Judge, dissenting, which withdrew the opinion of December 26, 1939 (R. 47-58).

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered December 26, 1939. Jurisdiction to issue the writ requested is found in Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is the petitioner, a gold mining corporation, entitled to percentage depletion under Section 114 (b) (4) of the Revenue Act of 1934? Or is it to be denied depletion for 1934 and all succeeding years, because, by reason of its isolated location in the interior of Alaska, it had no knowledge of the enactment of the provision allowing percentage depletion and, therefore, could not and did not "elect" to take the percentage depletion allowance in its original 1934 return, although such allowance was claimed in an amended return?

SUMMARY STATEMENT OF MATTER INVOLVED.

The facts were concisely and fairly found by the Board of Tax Appeals as follows (R. 19-22):

"Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

"Flat is located in a remote part of Alaska on the 52nd parallel of latitude and 158th meridian of longitude. During the season of navigation, the usual means of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town.

"The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma.

"When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> '23. Depletion.—If a deduction is claimed on account of depletion, secure from the Collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.'

"Petitioner's officer read the instructions before executing the return for 1934.

"Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that peti-

tioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently.

"If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

"As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

"Petitioner's gross receipts from gold mining for the year 1934 were $99,711.56, and it has paid a tax for that year in the amount of $4,684.00.

"In its opinion, the Board states (R. 25):

"Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their 'election,' in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of the percentage method, they could not deduct at all. Not knowing of this statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind."

The Board of Tax Appeals, on the authority of *Dorothy Glenn Coal Mining Company*, 38 B. T. A. 1154, and *C. H. Mead Coal Company*, 38 B. T. A. 1163, affirmed the Commissioner (R. 19-28) on the narrow ground that the "first return" designated in the statute meant the first form filed, so an election made in an amended return did not comply with the statute.

The Fourth Circuit reversed the *Mead Coal Company* case, 106 F. (2d) 388, stating:

> "In using the words 'first return' Congress evidenty intended to include a completed first return or a first return as properly amended and did not intend to limit the taxpayer's right of election to the first form filed * * *. A first return is no less a first return because amended * * *"

The Ninth Circuit affirmed the Board in the case at bar and, in so doing, expressly indicated its disagreement with the Fourth Circuit in the Mead Coal Company case (R. 51).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision below is in direct conflict with the decision of the Fourth Circuit in C. H. Mead Coal Co. v. Commissioner, 106 F. (2d) 388.

The Fourth Circuit in construing the statute here involved under substantially similar facts has reached a conclusion directly contrary to the conclusion in the case at bar. *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388.

In the Mead case, the "election" to take a percentage depletion deduction for 1934 was first stated in an amended return filed February 6, 1936. In the case at bar the election to take percentage depletion for 1934 was first made in an amended return mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8).*

The Ninth Circuit in the case at bar describes the conflict as follows (R. 51):

> "Petitioner argues that amended returns, while not provided for by law, are recognized and have been uniformly construed as being amendments or supplements to the original return. Hence, it is said, the 'first' return means an amended first return; so, an election made in an amended first return is an election made in a 'first' return.

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*The Board of Tax Appeals indicates it may have adopted the **Mead Coal Company** theory to the extent that an election to take percentage depletion is "timely" and, therefore, effective if made in an amended return filed before returns for the succeeding taxable year are due. See **Walter C. Hill,** 41 B. T. A. No. 38 (Feb. 1, 1940), and **Kehoe-Berge Coal Co.,** 41 B. T. A. No. 45 (Feb. 7, 1940).

"In the Fourth Circuit, in *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388, the court reached a similar conclusion, holding that in using the words 'first return' Congress intended to include a first return as properly amended. * * * The holding appears to confuse the statutory requirement with the supposed authority or duty of the Commissioner to relieve against mistakes."

* * * * * * *

"* * * By first return, we think, Congress had reference to the return contemplated by Sec. 53 of the act, that is, to the return required to be filed on or before the 15th day of March following the close of the calendar year, or within such extended time, not exceeding six months, as has been granted by the Commissioner under Sec. 53 (a) (2)."

II.

The decision below is in conflict with decisions of this Court.

In *Haggar Company* v. *Commissioner,* 84 L. Ed. 287, 60 S. Ct. 337, decided January 2, 1940, this Court was confronted with a statute dealing with the capital stock tax, which provided:

"the adjusted declared value shall be the value, as declared by the corporation in its *first return* under this section *(which declaration of value cannot be amended)*" (Italics supplied).

This Court held:

"The 'first return' as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as 'first' is obviously used to distinguish the return made for the first year from the return 'for any subsequent year' * * *."

This Court adds:

"A timely amended return is as much a 'first return' for the purpose of fixing the capital stock

value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first year (citing authorities); see, also, similarly construing the phrase 'first return' under Sec. 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680, 710; *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, 390."

The Mead case cited above is the case which is in admitted conflict with the case at bar. The Court below in the case at bar, however, felt that its interpretation is in harmony with this Court's decision in the Haggar case (R. 52).

The decision below likewise seems to be in conflict with *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, wherein, in a limitations case, it was held that an amended return is amendatory and supplementary to, relates back to, and becomes part of, the first form filed.

III.

The decision below departs from the accepted and usual course of judicial proceedings by disposing of this case on a ground not raised in, or considered by, the trial tribunal.

As Judge Mathews states in his dissenting opinion herein (R. 58), the Commissioner denied depletion solely on the ground that the claim was "based upon an amended return" instead of an original return. On this ground and no other the taxpayer sought to justify his action. No question of the timeliness of the amended return was suggested or raised before the Board of Tax Appeals or the Circuit Court of Appeals.

It is established law that an appellate court cannot consider and dispose of cases on issues not raised in the lower tribunal.

Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418.

Helvering v. *Wood*, 84 L. Ed. 511, 514 (February 26, 1940).

Bell & Grant v. *Bruen*, 1 How. (42 U. S.) 169, 187.

In *Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, the amended return claiming percentage depletion for 1934 was filed February 6, 1936. In the case at bar the amended return claiming percentage depletion for 1934 was mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8). Apparently, the question of the timeliness of the amended return was not raised in the *Mead Coal Company* case. Likewise, as Judge Mathews points out, it was not raised or argued in the case at bar.

CONCLUSION.

For the reasons stated, the writ of certiorari should issue to resolve the conflicts mentioned.

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April, 1940.

Brief in support of Petition for a Writ of Certiorari begins on following page.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The first opinion of the Circuit Court of Appeals (108 F. (2d) 713) was withdrawn (R. 46, 47 and 57) so is not in the record. The second opinion of the Circuit Court of Appeals is not, as yet, officially reported, but appears in the record at pages 48-58. The Memorandum Findings of Fact and Opinion of the Board of Tax Appeals are not officially reported but appear in the record at pages 19-28.

JURISDICTION.

The jurisdiction of this Court is discussed at page 2 hereof.

STATUTE INVOLVED.

Sec. 23, Revenue Act of 1934:

> "Deductions from Gross Income. In computing net income there shall be allowed as deductions: * * * (m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion * * *, according to the peculiar conditions in each case; * * *"

Revenue Act of 1934, Section 114 (b) (4):

> "Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, * * *. Such allowance shall not exceed 50 per centum of the net in-

come of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer * * *."

STATEMENT OF THE CASE.

The facts are fully set forth in the petition at pages 3-6 hereof, so are not repeated here.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals below erred in denying petitioner a percentage depletion deduction.

(2) The Circuit Court of Appeals below erred in holding that an "election" to take percentage depletion made in an amended return was not an election made in the "first return."

(3) The Circuit Court of Appeals below erred in considering the question of the timeliness of filing the amended return when that question was not raised or argued before the Board of Tax Appeals or the Circuit Court of Appeals.

ARGUMENT.

I.

The decision below is in direct and admitted conflict with a decision of the Fourth Circuit.

As pointed out in the petition at page 7, the Court below specifically admits (R. 51) its disagreement and conflict with *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388. The Ninth Circuit in the case at bar states:

> "Petitioner argues that amended returns, while not provided for by law, are recognized and have been uniformly construed as being amendments or supplements to the original return. Hence, it is said, the 'first' return means an amended first return; so an election made in an amended first return is an election made in a 'first' return.
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> "In the Fourth Circuit, in *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, the court reached a similar conclusion, holding that in using the words 'first return' Congress intended to include a first return as properly amended. * * * The holding appears to confuse the statutory requirement with the supposed authority or duty of the Commissioner to relieve against mistakes.
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> "* * * By first return, we think, Congress had reference to the return contemplated by Sec. 53 of the act, that is, to the return required to be filed on or before the 15th day of March, following the close of the calendar year, or within such extended time, not exceeding six months, as has been granted by the Commissioner under Sec. 53 (a) (2)."

In the Mead case, the "election" to take a percentage depletion deduction for 1934 was first stated in an amended return filed February 6, 1936. In the case

at bar the election to take percentage depletion for 1934 was first made in an amended return mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8).

II.

The decision below is in conflict with decisions of this Court.

In *Haggar Company* v. *Commissioner*, 84 L. Ed. 287, 60 S. Ct. 337 (January 2, 1940), this court stated:

> "The 'first return' as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as 'first' is obviously used to distinguish the return made for the first year from the return 'for any subsequent year' * * *.
>
> * * * * * * *
>
> "A timely amended return is as much a 'first return' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years as is a single return filed by the taxpayer for the first year (citing authorities); see, also, similarly construing the phrase 'first return' under Sec. 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680, 710; *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, 390."

It is significant that this Court, in the Haggar case, cited with approval the Mead Coal Company case which is in admitted conflict with the case at bar.

In *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, this Court, in a limitations case, held that an amended return is amendatory and supplementary to, relates back to, and becomes part of, the first form filed. The decision below is in conflict with the Zellerbach decision.

III.

The decision below departs from the accepted and usual course of judicial proceedings by disposing of this case on a ground not raised in, or considered by, the trial tribunal.

Judge Mathews' dissenting opinion in the case at bar expresses the view that the Commissioner disallowed the depletion deduction solely on the ground that the claim therefor was "based upon an amended return" and, on that ground and no other, sought to justify his action without claiming or suggesting before the Board of Tax Appeals or the Circuit Court of Appeals that the amended return was not timely. Consequently, the Circuit Court of Appeals could not, with propriety, consider or decide the question of the timeliness of the amended return.

The accepted and usual course of judicial procedure is that appellate courts must confine their review and decision to issues raised in the lower tribunals.

As recently as *Helvering* v. *Wood*, 84 L. Ed. 511, 514, decided February 26, 1940, the rule was held to be as stated above and the decision in favor of the taxpayer affirmed. The extent to which the rule is established is shown by the decision in *Helvering* v. *Clifford*, 84 L. Ed. 504, decided the same day, which resulted in a decision for the Commissioner on facts substantially similar to those in the Wood case. The reason for the different results in the cases mentioned was that the Clifford case was disposed of on the basis of a government contention which had not been made in the lower court in the Wood case.

On the same general question see:

Bell & Grant v. *Bruen*, 1 How. (42 U. S.) 169, 187.
Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418.

In *Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, the amended return claiming percentage depletion for 1934 was filed February 6, 1936. In the case at bar the amended return claiming percentage depletion for 1934 was mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8). Apparently, the question of the timeliness of the amended return was not raised in the *Mead Coal Company* case. Likewise, as Judge Mathews points out, it was not raised or argued in the case at bar.

Conclusion.

For the reasons stated certiorari should issue to resolve the conflicts mentioned and to dispose of the case in accordance with the accepted and usual course of judicial proceedings.

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